

ORIGINAL

In the
Supreme Court of the United States

UNITED STATES,

PETITIONER,

v.

NEW YORK TELEPHONE COMPANY,

RESPONDENT.

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No. 76-835

Washington, D. C.
October 3, 1977

Pages 1 thru 52

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

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No. 76-835

NEW YORK TELEPHONE COMPANY,

Respondent.

Washington, D. C.,

Monday, October 3, 1977.

The above-entitled matter came on for argument at
11:08 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, Esq., Office of the Solicitor
General, Department of Justice, Washington, D. C.;
on behalf of the Petitioner.

GEORGE E. ASHLEY, Esq., 1095 Avenue of the Americas,
New York, New York 10036; on behalf of the
Respondent.

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Lawrence G. Wallace, Esq.,
for the Petitioner

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George E. Ashley, Esq.,
for the Respondent

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Lawrence G. Wallace, Esq.,
for the Petitioner - Rebuttal

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in United States v. New York Telephone Company.

Mr. Wallace, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALLACE: Mr. Chief Justice, and may it please the Court: The issue in this case is the validity of an order authorizing FBI agents to install and use pen registers, as these devices are commonly called, on two designated telephones and ordering the respondent telephone company to furnish all information, facilities and technical assistance needed to install the pen registers unobtrusively.

The order was based on a finding of probable cause to believe that certain named individuals and others unknown were conducting an illegal gambling enterprise in violation of Federal law by the use of the two designated telephones at a certain address specified in the order, and these findings were based on an affidavit by an FBI agent showing the reasons for believing this information to be true.

The sufficiency of that affidavit and of the orders specificity and reasonableness under the Fourth Amendment are not disputed here. Indictments have since been returned with respect to this investigation, and motions to suppress have been denied. It is in that proceeding that such issues would

be litigated.

Now, the order itself appears in the appendix at pages 6 and 7, preceded by the affidavit, incidentally. The order has considerable particularity in Fourth Amendment terms, and it contains a couple of provisions to which I want to draw particular attention.

One is at page 7, at the conclusion of the first paragraph, the order specifies that the telephone company is to be compensated for at the prevailing rates for providing the facilities and technical assistance required, and the other is in the next "wherefor" clause, Part B, the purpose of the order is specified here. It is to ascertain by identifying outgoing calls the numbers that are dialed in outgoing calls, to identify associates and confederates of those who prior investigation, including a prior authorized wire tap, indicated were involved in this enterprise, and this is for purposes in looking at the outgoing calls of ascertaining the scope of the gambling conspiracy, where it is that bets may be being laid off, as the expression is; when they may receive more in the way of particular bets than they can handle, then confederates, other gambling enterprises, will be called to see if they can take a portion of the bet.

This is an investigative technique to indicate the scope of the gambling conspiracy.

And that was the purpose of what was involved here.

Now, the pen register devices themselves are familiar to this Court. They were involved in the case of *United States v. Giordano* and the District Court there described in some detail how they operate and what they do. They disclose only telephone numbers that are dialed from the telephone to which line the device is attached. In the absence of some further attachments to the pen register device which are not authorized by this order, the pen register does not indicate whether any conversation is occurring over the line let alone hear any conversations, does not indicate whether it is a result of dialing. There is a ring, a busy signal at the other end, how many rings, whether the telephone is answered: None of that can be ascertained by the use of what was authorized by this order.

So essentially the information that is received is nothing different than what could be secured from telephone company records to the extent that they are maintained. Telephone toll calls or message unit billing records, long-distance calls -- every telephone company has records that can be secured without any showing of probable cause by grand jury subpoena.

QUESTION: There just are no records, however, are there, of non-toll local calls made from an ordinary telephone?

MR. WALLACE: There is no indication that there are

such records here.

Some local telephone companies do keep track of local calls, do have records of them because of billing practices based on message units. In limited --

QUESTION: Well, that may show the number of calls, but does it show the numbers called?

MR. WALLACE: In some telephone companies it does, that is my understanding. There is nothing in this record to indicate that one way or the other.

QUESTION: My experience was, it was not possible to get those, in response to a subpoena.

MR. WALLACE: Well, to the extent that they are available, they can be secured that way. The telephone company here says that they are not available --

QUESTION: And your argument is that this -- as I thought, the inference to be derived from your argument was this would provide no more information than could have been secured by subpoena, and that is not --

MR. WALLACE: Well, if those records were there --

QUESTION: -- your argument is not valid.

MR. WALLACE: Well, that's right. To the extent those records are available, they can be secured by subpoena.

QUESTION: Well, to the extent they are, that's the whole critical "if" in your argument.

MR. WALLACE: Well, that is correct, and the pen register device is often used by the telephone company to ascertain this kind of thing for billing purposes and to make its own records when it has concerns relating to toll billing, but --

QUESTION: -- internal use of the pen register for its own purposes by the telephone company?

MR. WALLACE: The record doesn't show it, but there is showing of this in sources that we have cited in our brief dealing with the use of pen registers.

QUESTION: Do those sources show a widespread use, a continuous use by the telephone company of pen registers for

their own internal purposes?

MR. WALLACE: That is the principal use of pen registers by the telephone company, rather than by law enforcement officials.

QUESTION: This is New York City?

MR. WALLACE: That is correct.

QUESTION: Do you tell me that in New York City they have pen registers on every phone in New York City?

MR. WALLACE: Oh, not on every phone. It is just that the telephone company does use them. I am sure that counsel for the telephone company can shed more light on this. There's nothing in the record on the extent to which they use it.

QUESTION: I mean, what is the percentage number?

MR. WALLACE: I have no idea.

QUESTION: It would be very small --

MR. WALLACE: I would have no idea, Mr. Justice Marshall.

QUESTION: There are quite a few phones in New York City.

MR. WALLACE: That is correct. It would be a spot check situation, as Mr. Justice Stewart suggests, so far as I am aware.

The purpose of my comparison is merely to point out the very limited nature of the information that can be

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ascertained through the use of these devices. Many generalizations that are heard about the evils of electronic surveillance are not responsive to the limited authorization, the limited investigatory technique that is involved here, which gives you nothing more than what you can get from the telephone company with respect to long-distance calls. Whatever the situation is with respect to local calls, it's hard to see why there's a constitutional difference between local and long-distance calls for these purposes.

And those records are not contested, would be available under this Court's decision that's analogous to this in United States v. Miller, with respect to bank records, and more specifically, the Second Circuit Court of Appeals some years ago addressed this question in a case cited in our brief called United States v. Gallo, G-a-l-l-o, a panel consisting of the two judges, Hand and Judge Swann, who wrote the opinion, holding that the evidence was competent taken from the telephone company by subpoena showing calls between a phone in the appellant's home and telephones registered in the names of certain co-defendants who pleaded guilty. It was of limited probative value because it showed nothing but the existence of such calls, but it was admissible, and the admission was upheld, and the Court explained there that this was not a violation of Section 605 of the Communications Act, which at that time forbade the telephone company or anyone else from

4 disclosing the contents of wire communications.

The statute they held -- and I wish I had known about this in connection with United States v. Miller, I wish I had known about this case -- but the statute was not intended to proscribe long-standing reasonable business practices of communication companies. When a person takes up a telephone, he knows that the company will make or may make some kind of a record of the event, and he must be deemed to consent to whatever record the business convenience of the company requires.

If by any stretch of the language of Section 605, which no longer applies in this area, the making of such a record could be termed an interception of the communication, it is one which the sender has authorized, hence it is not within the ban of the statute.

QUESTION: That should be cited in the brief.

MR. WALLACE: It is cited.

QUESTION: Oh, it is cited.

MR. WALLACE: United States v. Gallo. Well, I was just reading from the opinion a pertinent portion which goes to this question.

To the extent that what's involved here could be characterized as a communication at all, it is a communication to the telephone company requesting service, the dialing of the number. It's not the kind of communication that either the old Section 605 or current statutes have been concerned about.

5 Now, in response to the order, the telephone company here did furnish all the information required to enable the FBI to do the installation itself, identifying where the lines could be found and that sort of thing, and if there had not been compliance to that extent, the FBI would have been physically unable to carry out the order.

 QUESTION: Do you agree that the, that an official pen register must have court consent and approval?

 MR. WALLACE: Well, not necessarily court consent: We think that it would require a warrant that can be issued by a federal magistrate.

 QUESTION: So you don't say that without any official approval at all, the FBI could install a pen register? You need a warrant?

 MR. WALLACE: Well, absent exigent circumstances, at least. There is that exception to the warrant requirement under the Fourth Amendment and no statutory reason why it wouldn't apply here.

 QUESTION: Thank you.

 MR. WALLACE: Here we did secure a warrant. They sent a finding of probable cause.

 QUESTION: I am not sure I follow that. If these were records which were available, which you assumed in your colloquy with Justice Stewart, why couldn't the FBI just go over and ask the telephone company to see what they had?

MR. WALLACE: Well, my understanding is that these records are not available in the New York Telephone Company.

QUESTION: Well, to the extent that they are available. Now, why couldn't the FBI just go over and say, "What have you got in the nature of pen register records, maybe just long-distance calls, from this number?" Is there anything --

MR. WALLACE: They needed a warrant to install the pen register to ascertain the numbers that are being dialed from these telephones.

QUESTION: Well, you say that, but what required the warrant? What legal rule required them to get a warrant to get additional numbers beyond those that are already recorded by the telephone company?

MR. WALLACE: Well, they showed a need in their criminal investigation to get the numbers.

QUESTION: Oh, I understand the practical reason why they wanted them, but why couldn't they just do it independently? Assume they had the technical know-how.

MR. WALLACE: Well, it could be argued that they could.

QUESTION: The Gallo case, it might follow that they could.

MR. WALLACE: Yes, it might follow, and it has been argued in some of the literature that they could. We think that the implications of the Court of Appeals decisions on

this question and of the opinion agreed to by four members of this Court in United States v. Giordano is that there is a search within the meaning of the Fourth Amendment involved here, and in order to conduct the search, where there's time to get a warrant, we ordinarily will get a warrant, make our showing.

QUESTION: You don't have to get into the point of the right of the FBI to walk into a business establishment and tap a phone, do we?

MR. WALLACE: No.

QUESTION: Do we have to get to that point, to decide this case?

MR. WALLACE: We're not -- not at all, we're not involved with a tap in this case, or what is commonly called a tap.

QUESTION: Physically how do you install that?

MR. WALLACE: It's installed by -- it's installed to the line, it's a tap in that sense, but it's not a tap that enables you to listen to anything on the line.

QUESTION: What I mean is, if you're going to install a pen register, say on my telephone, how is it done?

MR. WALLACE: Well, the way that it normally is done, in order for it to be done unobtrusively, is by leasing a line from the telephone company which the telephone company can indicate how that line can be connected at a box where the two

lines emerge to the telephone that you want to attach the pen register to, and then the leased line can be extended to a location where the pen register can be attached to the leased line.

Otherwise cables would have to be attached to the box in the apartment building or on the back of the building where the telephone line makes what is called an appearance in order to have a line to which the pen register could be attached. And as a matter of fact, that was the precise problem here.

While the telephone company was willing to provide the information, it was not willing to lease the line to the FBI which would enable the FBI to install the pen register unobtrusively, without having to string cables.

Instead, the telephone company suggested to the FBI that they should string their own cables from this apartment building in order to install the pen register and comply with the order, and after a four-day --

QUESTION: A pen register, I gather, is just a recording device? Is that it?

MR. WALLACE: That is correct.

QUESTION: And does the FBI keep an inventory of pen registers?

MR. WALLACE: They do have them; that is correct.

QUESTION: In this instance, would they want the telephone company to provide the pen register from the telephone company stock, or would they --

MR. WALLACE: Not the pen register. They would have provided their own, or it would have been agreeable to them if the telephone company had wanted to install its pen register somewhere.

QUESTION: Who manufactures them, the telephone company?

MR. WALLACE: I don't know the answer to that, but the registers here were FBI property.

QUESTION: How large a device is it, small?

MR. WALLACE: There are pictures. I don't know precisely.

But the point is that the FBI made a four-day surveillance of the neighborhood, knowing that counter-surveillance techniques were being used by this gambling enterprise which had a history, the record shows, of changes of address and changes of telephone numbers quite frequently, and they concluded that they could not execute the warrant unobtrusively without the leased line; that sending agents in to string a line there would have resulted in cessation of the

gambling activities and frustration of the court's order.

So in the meantime, the telephone company filed a motion in the case seeking vacation of that part of the order requiring them to provide facilities, and that order was denied in all respects by the District Court, but granted by the Court of Appeals in a two-to-one decision, the majority agreeing with the Court of Appeals for the Seventh Circuit in a prior decision, and since then the Eighth Circuit has also agreed with this, held that the District Court did have authority to authorize the FBI to install the pen register, and it assumed arguendo that it, that there was also authority, either inherently or under the All Writs Act, to require the telephone company to provide the assistance to enable that order to be carried out, but it held that it would be an abuse of discretion in the absence of specific legislative authority on this subject to exercise that authority on the basis of what might be called the first step down a slippery slope kind of rationale.

What is significant for our purposes in the opinion can be found in paragraphs on pages 13A and 14A of the appendix to the petition, in which the Court of Appeals specifies that what it calls the most persuasive point argued by the Government in support of the order is that without the appellant's technical aid, the order authorizing the use of the pen register will be worthless.

1 Federal law enforcement agents simply cannot implement pen register surveillance without the telephone company's help. The assistance requested required no extraordinary expenditure of time or effort by appellant; indeed, as we understand it, providing lease or private lines is a relatively simple routine procedure -- and I'll interject there that the dissenting judge specified, this is on page 20A of the appendix, that the telephone company concedes that the assistance required of it was not burdensome. All that was required was the provision of certain plans and the flicking of a switch at a central terminal.

QUESTION: That is rather a sweeping concession which the telephone company might not be happy to rely on, that they can provide this technical assistance without fear of criminal or civil liability. Does the Court cite any authority for the proposition?

MR. WALLACE: The Court did. The Court cited Section 2520 of Title 18, which is part of Title 3 of the Omnibus Crime Control Act of 1968, and that provision specifies --

QUESTION: Does that deal with civil liability?

MR. WALLACE: It does, it deals with both civil and criminal liability, and it specifies that a good faith reliance on a court order or on legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or any other law.

The Court of Appeals for the Seventh Circuit referred to certain other legislation that would grant immunity from liability. The finding here was that because of Section 2520 the telephone company need have no fear of liability if it acts pursuant to a court order, and of course the order provides for financial remuneration to the company.

So the --

QUESTION: Mr. Wallace, has the Congress been invited to legislate, do you know?

MR. WALLACE: I'm not aware of any pending legislation, Mr. Justice Blackmun.

Now, the argument that respondent seeks to renew here, although it did not petition, and we have agreed that it's sufficiently closely connected with the rest of what else is at issue that it should be considered by the Court, that Title 3 governs this, seems to us to have been adequately answered in the concurring and dissenting opinion filed by four Justices in Giordano, and I will have to leave that argument to their opinion and to the brief, the legislative history is very specific on that point, that pen registers are not covered, and it was the content of the communication rather than the fact of the communication that was to be protected.

What remains here are the question about the validity of the order with respect to the authorization itself, which we think Rule 41 applies to, as it seemed to us the Court of

Appeals assumed in Katz and Osborne with respect to seizure of intangible electrical impulses of this sort, or since it's sometimes referred to as an order in the nature of a search warrant, one could instead resort to Rule 57B of the Criminal Rules, which authorizes the District Court to proceed in any manner not prohibited elsewhere.

Either way, the protections of the Fourth Amendment are satisfied in this area, and the rule with some adaptation, because it doesn't specify, it's not drafted in terms of a durational search of the sort that's involved here, with some adaptation --

QUESTION: Do we understand that Rule 57B is a grant of jurisdiction?

MR. WALLACE: Well, we really are relying on Rule 41. Rule 57B I think gives some authority to proceed in the nature of Rule 41 when the terms of Rule 41 need to be varied somewhat, because of a different kind of --

QUESTION: Let me ask the question again: Do you or do you not contend that Rule 57 is an independent grant of jurisdiction to a Federal court?

MR. WALLACE: Well, we haven't made that contention. I don't want to concede that it is not, however. We think Rule 41 is satisfactory for our purposes here, and that the issue then becomes whether, when, an order issued under Rule 41 cannot be carried out without the technical assistance of

a third party, whether a court or the telephone company, in this case, is to decide whether the order will be carried out. We think the Court has ample authority under the All Writs Act to effectuate its order, as has been done in many situations involving injunctive orders to third parties, including cases in which convictions have been upheld for contempt of such injunctions when they were issued to uphold school desegregation decrees, for example, and there are other examples which I really don't have time to go into.

QUESTION: Why do you need the All Writs Act, Mr. Wallace? Doesn't 41 authorize the issuance of subpoenas and discovery from persons not parties to the action?

MR. WALLACE: Well, it does, but the contention that is being made is that it doesn't authorize the requirement that an unwilling third party assist in the execution of a search warrant.

QUESTION: Well, is that a matter of substantive law or of the right form of action, as you understand the contention?

MR. WALLACE: I think their contention is a matter of substantive law, but I'm not sure; I'm not sure, Mr. Justice Rehnquist. But there is a long history of the use of such matters, and I -- if I may, I just want to refer the Court to one case, United States v. McKee, which is not cited in the briefs, 196 Federal Reporter 586, which I informed opposing

counsel about last week. One has to go back here to 1912 to find an answer being made in some detail to the contention that the All Writs Act does not permit writs to be issued to third parties, and the Court's answer at that time was that that hasn't been the practice at all. There have been many instances for the use of the All Writs Act in its history for that purpose. It's been true of injunction execution, subpoena ad testificandum, subpoena duces tecum, writ of prohibition, et cetera.

It's an argument that one has to go back into history to find an answer for, and if I may, I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Wallace.

Mr. Ashley.

ORAL ARGUMENT OF GEORGE E. ASHLEY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ASHLEY: Mr. Chief Justice, and may it please the Court, New York Telephone Company is pleased that the Court has granted certiorari in this case to resolve the, to provide guidance and to resolve the conflict that exists in the circuits as to the right of the Government to proceed to get orders for the installation of pen registers and to order the affirmative assistance of the Telephone Company when it has not chosen to proceed under Title 3 of the Omnibus Crime Act of 1968.

16 We, of course, have no desire to obstruct law enforcement authorities in the discharge of their vital functions and, in fact, we have a long history of extensive cooperation in that regard. At the same time, we also have a long-standing policy of protecting the privacy of communications to the maximum extent that is feasible with the needs of law enforcement when those exceptions are spelled out by clear requirements of law.

While we believe we do have a legitimate concern with potential civil liability if the orders that are here sought are not lawful, and there have been a number of cases in which the telephone companies have been sued because we're sort of in the middle in this kind of situation, nevertheless our primary purpose for being here and in cooperating in bringing this matter before the Court is because of its implications for the protection of the privacy of communications.

Given the extent to which the telephone system is used for social and business intercourse in this country, we believe it's inconsistent with the rights of a free society to have the privacy invaded any more than is found to be warranted by clear definitions and exceptions in the statutes.

This Court and Congress have long been concerned with balancing these two interests. The history goes back to the Olmstead Case in 1928, and then to the Nardonne Case in the Thirties when this Court, on its own initiative, instituted the

17 exclusionary rule. And then you come on down through the many cases intervening to the cases in the Sixties, Osborne, Katz and Burger, which left the whole matter so complex and confused around the country that Congress addressed it head-on in enacting the Omnibus Crime and Safe Streets Control Act in 1968. And Title 3 of that act deals very extensively with the whole matter of electronic surveillance.

We believe that the Senate report indicates that Congress intended to legislate comprehensively and preemptively in the area of electronic surveillance.

QUESTION: Did the Court of Appeals agree with you?

MR. ASHLEY: It agrees, I think, that Title 3 is very sweeping and very comprehensive in scope. It does not agree that the requirement for pen register is --

QUESTION: Is covered by Title 3?

MR. ASHLEY: -- covered under Title 3.

QUESTION: And you disagree with that?

MR. ASHLEY: We think there is certainly a serious question.

QUESTION: Well, are you entitled to urge that here?

MR. ASHLEY: We believe that it's implicit in the issue that's here, because there would be no authority to order the telephone company to provide the leased line facilities unless the Court also decides that the basic underlying order was properly granted.

QUESTION: But the Court of Appeals' opinion is much narrower than that. It said that Title 3 doesn't cover this.

MR. ASHLEY: You're correct, Your Honor.

QUESTION: If you wanted to challenge that, you really should have cross-petitioned, I suppose.

MR. ASHLEY: Well, it's my understanding that the Government also believes that this is subsumed in the issue that is before the Court.

QUESTION: But the Government doesn't bind us either.

MR. ASHLEY: No, I think that's true. But I think if the Court goes, handles this case and passes upon the requirement that the telephone company provide leased line facilities under these circumstances, then it will for the first time really have come to grips with the issue as to whether pen register orders can be issued outside the scope of Title 3, and this Court up to this time has not specifically addressed that point.

QUESTION: Well, the Court of Appeals also thought that Rule 41 authorized issuance of warrants for pen registers, didn't it?

MR. ASHLEY: Yes, the Court --

QUESTION: And you disagree with that?

MR. ASHLEY: Yes, we do, and we think --

QUESTION: Are you urging us to overturn the Court of

19 Appeals in that regard?

MR. ASHLEY: We're saying that this case being properly before the Court, that that issue ought also be addressed head-on by the Court because of the wide disagreement, not by circuits, but there have been other --

QUESTION: But no one has challenged that rule.

MR. ASHLEY: Well, Judge Oliver in the Western District of Missouri felt --

QUESTION: I know, but nobody's presented that issue to us in any of the papers here.

MR. ASHLEY: Well, I think the matter is fully briefed, Your Honor, in both the Government's brief and --

QUESTION: But if we agreed with you, you would be enlarging the relief the Court of Appeals gave you?

MR. ASHLEY: Well, the Court of Appeals --

QUESTION: We'd be giving you relief the Court of Appeals never gave you.

MR. ASHLEY: It would be finding that the basic underlying order is not warranted, and that is not a finding that has been made by the Court below.

QUESTION: The relief you did get, though, if you were to prevail on these, assuming we could entertain your arguments that the Court of Appeals is wrong in both respects--

MR. ASHLEY: We're merely here --

QUESTION: -- if we did, would that support the

order that the Court of Appeals entered?

MR. ASHLEY: Our position with respect to --

QUESTION: Or give you a broader order, which?

MR. ASHLEY: I'm sorry, Your Honor; I didn't understand.

QUESTION: What was the relief you got below?

MR. ASHLEY: The relief that was allowed below really goes to the issue of the extent of the order that should be directed to the telephone company, and that is the matter that does directly impinge upon us, and it is the matter in which there's a conflict --

QUESTION: Well, does that --

MR. ASHLEY: -- between the circuits.

QUESTION: And would you be entitled to the order you got below had you prevailed on your argument that the Safe Streets Act --

MR. ASHLEY: If a different result had been reached as to whether the Title 3 order was warranted in the first place, there would have been no need to reach the second order. There would have been no order to the telephone company at all, under those circumstances.

QUESTION: Even though you didn't cross-petition, then aren't you in a position to urge these questions on us?

MR. ASHLEY: We believe it's inherently involved in the issue that is before the Court.

QUESTION: The ordinary rule is that you're entitled here to defend the order below on whatever ground is available.

MR. ASHLEY: And there are various cases to that effect cited in the Government's brief, in which they agree that the issue should be addressed.

QUESTION: Well, you can do that without expanding your relief, can you not?

MR. ASHLEY: Yes.

Well, before I move on from that point, I'm merely here urging because of the fundamental nature of it and because that issue has not been directly addressed by this Court, even though there are numerous decisions assuming that pen register orders are outside the scope of Title 3, that this Court in providing guidance to the courts around the country not start with the previous position and with a closed mind with respect to that, but instead address that issue in this case so that it will not be merely assumed without being addressed and analyzed.

QUESTION: Does this record show that you use pen registers yourself?

MR. ASHLEY: Not the record itself, but the briefs and the statements that we have made. In fact, we state positively that the customary use of pen registers is for very limited purposes within the operation of the telephone business.

For example, we may be required to check on the

accuracy of billing, and this is the way in which that's done. We may in certain difficult situations where there are harassing calls and things of that sort, we may need to trace a call.

QUESTION: Indeed, you actually listen in on conversations.

MR. ASHLEY: No.

QUESTION: Yes, you do, when there's fraud involved or you suspect it.

MR. ASHLEY: Yes, and in other circumstances --

QUESTION: So I mean, it's not just clear and unclear. You do violate the rights of privacy of people.

MR. ASHLEY: Well, Your Honor, I hesitate to accept that characterization. There is certain service observing that is done on the way in which the operators handle a call --

QUESTION: Right.

MR. ASHLEY: -- but when that is done, those are timed out so that they do not go into the conversation itself.

QUESTION: But they do listen in --

MR. ASHLEY: And the pen register that we're talking about, when it is -- we do it only to the extent to prevent fraud and to protect the integrity of the system, so that there's no violation of --

QUESTION: So you do it to prevent violation of law.

MR. ASHLEY: Yes.

QUESTION: Now, what is this pen register for the

Government wants?

MR. ASHLEY: This is one by the Government in which they want to intercept and listen in --

QUESTION: And prevent violation of the law.

MR. ASHLEY: Yes, sir. Yes, sir, but that, the extent to which Government has been permitted to use pen registers has a long history. It goes back to the enactment of the Communications Act in 1934, and for the entire period of time from 1934 until the passage of the act in 1968, the use of pen registers by law enforcement authorities was prohibited by Section 605, and the cases are unanimous on that.

QUESTION: In the Gallo case it held otherwise?

MR. ASHLEY: No, the Gallo case had to do with securing the toll records of the telephone company under subpoena, not with the --

QUESTION: Use of pen registers.

MR. ASHLEY: -- use of pen registers.

In fact, in a much, much later case, the Dote Case, when the Government secured the pen register information where the telephone company had used the pen register in the regular course of its business, it was found that that was an unauthorized interception by the Government, that they had no right to those pen registers.

QUESTION: So that I fully understand, how much use does New York Telephone Company make of pen registers in

the ordinary course of business?

MR. ASHLEY: They use them when there is a complaint about a billing error, to check the dialing to see whether the machinery is working properly and so that the party is truly billed for the number of calls that they make. They may be required in certain instances, limited instances, to trace calls, and that is done with the consent of the party, and as Mr. Justice Marshall has brought out, in order to protect the system against fraud, to prevent, you know, the use of blue boxes and things which make calls, enable the making of calls without the charging on a selected basis, there is that sort of --

QUESTION: Well, what you're telling me, then, I gather is that it's the exception, not the ordinary course of business.

MR. ASHLEY: Oh, yes, it is not ordinarily done, and I'm also telling the Court that throughout the long history of the use of pen registers, that there has been exceptions in the law for the limited use by telephone companies in the necessary conduct of the business, and that that has been one set of rules, and the extent to which law enforcement authorities have had the right to use pen registers has been governed by, has been prohibited by statute until 1968.

QUESTION: Well, would you say to protect the system against fraud, another way of saying that is to maximize the company's revenues, isn't it?

MR. ASHLEY: Well, we're required under the Communications Act to bill for all calls that are made, and if parties are enabled to bypass the billing mechanism and so forth and perpetrate fraud on the system, we are in no position then to carry out our responsibility under the Communications Act to provide service without discrimination and to bill for all calls that are made.

QUESTION: Well, are you suggesting that the Communications Act didn't require you to bill for all calls made, you wouldn't do that?

MR. ASHLEY: Well, we also have an independent interest in seeing that we don't lose the revenue, as well. Yes, Your Honor, of course.

QUESTION: I suppose as a utility, like railroads and others, you would not be permitted to tolerate free service to some customers.

MR. ASHLEY: That's correct, it would be an unlawful rebate or it would be discriminatory as between customers if that end result were to be permitted.

QUESTION: Well, I just wondered, have you had any experience with a law enforcement agency wanting to get from you the results of a pen register surveillance that the company has conducted for its own purposes?

MR. ASHLEY: Yes, there are efforts to do that.

QUESTION: And what is the company's practice then?

To require subpoena, or what?

MR. ASHLEY: Yes, we would require a subpoena, but prior to, if you go back to the Dote Case, which is no longer the law because now it would be ruled by whatever the provisions of the Omnibus Crime Bill are, whereas Dote arose under Section 605, but the Dote Case was a case in which the telephone company had pen register information, turned it over to the law enforcement agencies, and this was held to be an unlawful acquisition of that information by the law enforcement agencies.

In other words, if the telephone company had pen register information as distinguished from toll billing records, those were not available to law enforcement agencies under the --

QUESTION: Without official process, anyway?

MR. ASHLEY: Well, that's right.

QUESTION: I suppose the grand jury could subpoena them in your hand?

MR. ASHLEY: Yes; yes.

I'd like to move to the second issue, because while I do urge the court to address this underlying issue because there have been numerous decisions that have assumed that Title 3 -- that pen register surveillance is outside Title 3, and four justices of this Court in the concurring and dissenting opinion in Giordano assumed the same, so it's quite an

uphill struggle. Nevertheless, I don't believe the issue has been directly addressed, and I urge you to do that.

QUESTION: Before you leave the point, do I correctly understand that in addition to arguing that Title 3 makes the underlying order invalid, that there was no authority for the court to order the pen register, you also argue in the alternative that the underlying order is invalid because not authorized by Rule 41 or any other Federal principle?

MR. ASHLEY: Yes, that's correct. And we add to that argument, Justice Stevens, that given the intent of Congress to act so comprehensively in this area and the long history that is behind it, we believe that there ought not to be assumed any inherent power and that since Rule 41 also does not cover it because of the nature of the rule, dealing with intangibles, the fact that -- there are numerous reasons set forth in our brief -- we believe that Title 3 ought to cover any use that is made of pen registers or else there should be remedial legislation.

QUESTION: Your position is that not only is this particular order unauthorized by Title 3 or Rule 41, but that under neither may the law enforcement agencies get a warrant for a pen register?

MR. ASHLEY: If they proceed under Title 3, they can, yes.

QUESTION: But not elsewhere?

MR. ASHLEY: But not elsewhere, yes.

QUESTION: You say if Title 3 doesn't reach it and Rule 41 doesn't reach it, then they ought not be permitted without additional legislation which does authorize it.

MR. ASHLEY: We believe that pen registers being a lesser invasion of privacy than full wire-tapping capability are within the power of the courts to authorize under Title 3.

QUESTION: If you're wrong about that --

MR. ASHLEY: Well, if we're wrong about that, then we see no authority for it.

QUESTION: And until there is such authority, you say no court order can authorize it?

MR. ASHLEY: Yes. But we believe if they follow the procedures under Title 3, and they are getting pen registers across the country, and we have not resisted cooperating under those circumstances.

QUESTION: -- for the Court of Appeals took even a narrower view, I guess, didn't he? He said there was power but that it was an abuse of discretion to exercise it.

MR. ASHLEY: This is on the second issue, to which I would like to turn.

QUESTION: Yes, yes.

MR. ASHLEY: Because I believe that it is a very fundamental issue, and it is, Justice Rehnquist, from our perspective, a substantive issue as well as a procedural issue.

And that is the extent to which courts have the power to order private citizens, even telephone companies, to actively participate in the act of criminal investigation without explicit statutory authority to do so.

QUESTION: Now, you consistently equate the telephone company with private citizens. Is there not a substantial difference between the telephone of a private individual and a utility which has received a monopoly by virtue of a franchise from the Government? Isn't there a difference in duties?

MR. ASHLEY: Oh, yes, sir. We don't deny that there is. But we believe that we are private citizens and there are employees, or private employees, private employer, except to the extent that, you know, special duties and responsibilities have been imposed upon us by the regulatory statutes. And there is no question but what those are --

QUESTION: But over the years you have construed that duty also to lead at least, the record suggests, to a good deal of voluntary cooperation with law enforcement officers.

MR. ASHLEY: Well, what we've done in the way of voluntary cooperation, we believe, are within the scope of our privileges and rights as a private employer, and we have responded in those instances to the extent that we believe it's --

QUESTION: You don't -- you don't -- then are you rejecting the idea that as a utility having a monopoly over

communications, that you have a higher duty than the ordinary citizen?

MR. ASHLEY: No, we are not rejecting that, but we say the extent to which that exists is spelled out by statutes, and it should be spelled out by statutes, rather than be something that we would assume ourselves without any limits, particularly in this instance in which we would be cooperating, in the invasion of the private use of the telephone system without explicit statutory authority to that effect. We don't believe we should assume to do that through any inherent obligation of a public utility. We believe that that should be spelled out.

QUESTION: In that respect, as Mr. Justice Stewart suggested, you're disagreeing with Judge Medina's view that there is authority, but that was an abuse of discretion to exercise it here?

MR. ASHLEY: Yes, we believe that there is no actual power, we believe the Ninth Circuit so held in the application of the United States case in 1970, which was a Title 3 case. But on this issue, the secondary issue as to the obligation of the telephone company, whether it is appropriate for a court to order the provision of leased facilities and the active involvement of the telephone company, on that issue we believe the Ninth Circuit decision is indistinguishable on the facts from this.

And what happened there was that the telephone company was ordered to provide lease lines as here, but in a Title III situation, the court, the Ninth Circuit held it had no such power, could find no such power to order it, and felt it would be unwise to do so without specific statutory authority.

Subsequent to that, then, it was taken to Congress. Congress did enact a statute which authorized the telephone companies to provide these lines when Title III orders were secured, and under those circumstances, provided immunity in the statute, the immunity to which my learned colleague here has made allusion. But he is giving us, he is relying upon the very statute that he says they do not need to follow in securing the underlying authority. He would use the very Title III which he says does not apply to this case, and which they do not have to follow, as a basis to give us the immunity, which I find very strange.

QUESTION: Where do you get the authority to put your pen registers?

MR. ASHLEY: Exception --

QUESTION: You said that you do not assume authority as a public utility; you are just a private citizen. Well, for private citizen I have trouble finding authority to put a pen register in.

MR. ASHLEY: No, not in this respect we are not

relying upon our rights as a private citizen. Under both the 605, the Communications Act before 1968 and under the Omnibus Crime Bill in 1968, exception was made for the telephone company in the necessary conduct of its business to do that.

QUESTION: And also to listen in?

MR. ASHLEY: Well, only to the extent necessary to carry out its functions as a telephone company. If we exceeded appropriate, you know, bounds in that respect, we would not be protected either.

QUESTION: So one or two words in 41 would give the Government the right? If Congress had put a couple words --

MR. ASHLEY: Well, I would say in Title III.

QUESTION: Yes.

MR. ASHLEY: It is twelve o'clock here.

MR. CHIEF JUSTICE BURGER: We will resume at one o'clock.

(A recess was taken.)

MR. CHIEF JUSTICE BURGER: Mr. Ashley, you may continue. You have a few minutes left.

MR. ASHLEY: Thank you, Mr. Chief Justice, and may it please the Court, I would like to continue on the point that regardless of the validity of the underlying Title III order insofar as it authorizes the Government, that the Court had no power to order the telephone company to actively participate in the act of criminal investigation.

I would just like to say that this is another example of where we try to strike a reasonable balance between the degree of involvement of the communications common carrier with the need for the efficient carrying out of the requirements of law enforcement.

QUESTION: The typical recipient of a subpoena, he does not feel he is entitled to strike the balance himself. You know, when you're subpoenaed to produce something before a grand jury, you know, you are certainly privileged to argue the subpoena is unauthorized, but I do not think ordinarily a private organization feels that its duty is to make the decision as to whether to produce or not.

MR. ASHLEY: No, I think generally speaking that is true. Of course, there are questions raised --

QUESTION: -- a subpoena is not used to require, affirmatively require by specific affirmative action, the active cooperation of a private citizen with law enforcement agencies?

MR. ASHLEY: Yes, that was the distinction I was going to make preliminary to that, I was going to say to Justice Rehnquist that private parties may raise the question of the burdensomeness, of course, of the subpoena, and so forth, and appeal to the sense of equity of the court, but I think the real distinction --

QUESTION: Isn't the remedy usually simply to provide financial compensation where the issue of burdensomeness

is raised?

MR. ASHLEY: That certainly is a major factor in whether the court would decide to go that far in requiring discovery.

QUESTION: The court did supply compensation for you here, did they not?

MR. ASHLEY: It is prepared to pay for the use of the facilities at the regular tariff rate; yes.

QUESTION: Do you have any -- did you challenge the fairness of the compensation?

MR. ASHLEY: No, we do not. That is not the basis. The basis is really the precedent for us and for citizens in general of requiring affirmative participation and acts in a criminal investigative process. We believe there is no precedent for that.

QUESTION: You suggested a precedent this morning: You do it for your own, in the execution of what you consider your own mission as a public utility.

MR. ASHLEY: We do that only in the conduct of our own business, within what we, you know, is lawful, but --

QUESTION: You would not want to call that a selfish interest, because it is not selfish, you have got to collect your revenues, but you do it for your own purposes, however appropriate those purposes are.

MR. ASHLEY: Yes, and so do all citizens and all

15 individuals. But it is extraordinary to expect citizens to directly involve themselves in the law enforcement process. The Ninth Circuit found that there was no precedent for that, and when the matter was presented to Congress, then Congress did amend Title III and provide that this should be done, but only when there was a Title III order. It did not go beyond that and authorize it, except within those very strict requirements of Title III.

QUESTION: How about posse comitatus? That is certainly a traditional way in which citizens are involved in the law enforcement process, is it not?

MR. ASHLEY: Yes. You have the precedent of the posse comitatus. You have the precedent of individual citizens in an emergency situation where a felon may be escaping and a law enforcement officer asks for assistance. There are a couple of cases of that sort that are cited in the petition by the Government. One was the opinion by Judge Cardozo and the Court of Appeals of New York, and another was here in Washington involving the Evening Star. But those incidents are really a time-honored marshaling of the resources of the community in an emergency situation which the Ninth Circuit said it was unwilling to find was a precedent for the kind of thing which is asked for here, which is ahead of judgment and without the emergency conditions that you had.

QUESTION: Why do you feel that the Ninth Circuit

said that absent Title III, they would have reached the result they did?

MR. ASHLEY: I was responding to the analogy to the posse comitatus. They specifically refused --

QUESTION: How would the Ninth Circuit have acted with respect to a pen register absent Title III? You do not know whether they would have analogized it to a posse comitatus or not.

MR. ASHLEY: Well, we are on the issue as to whether the telephone company could be required to --

QUESTION: I understand that, exactly.

MR. ASHLEY: And they found no authority for doing that.

QUESTION: They found that Title III impliedly forbade it, did they not?

MR. ASHLEY: No, I do not think so, except insofar as they said Congress has legislated comprehensively in this area, and if they intended --

QUESTION: And they did not go any farther than this, so we will stop there.

MR. ASHLEY: But I think, with all due respect, that if they felt this was an appropriate power of the court, they would have been more inclined to do it within Title III, where there was the basic underlying authority spelled out, than they would be in a situation where that was not the case. And

17 Congress, as I say, came along and authorized it in Title III but did not go beyond that and authorize it outside of Title III.

And I think it is very significant that when Congress acted in this respect -- and this goes back to the point that you, Mr. Chief Justice, asked me just before the luncheon recess -- that Congress did not act solely with respect to communications common carriers, but realized that the problem was with respect to the right to require affirmative assistance of citizens in general, and the language includes custodians, property, and other citizens than communications common carriers. They were all dealt with indiscriminately and the rights and responsibilities were, no distinction was made between communications common carriers and others.

QUESTION: May I ask you, what worries me is that the FBI comes to you and says, "Do you have a pen register on phone number 33-6589," and you say, "Yes," and they subpoena it, you deliver it. Right?

MR. ASHLEY: Well, we would not do it under -- without a Title III order.

QUESTION: They issue a grand jury subpoena, you deliver it?

MR. ASHLEY: Not without a Title III order.

QUESTION: I thought you said if you were subpoenaed, you would deliver anything that they asked for.

MR. ASHLEY: Toll billing records, ordinary business records; yes.

QUESTION: You would not deliver a pen register?

MR. ASHLEY: But with the precedent of the pen register which was forbidden prior to the enactment of 1968 and which was found that the telephone company should not turn those records over to law enforcement agencies, they had no right to secure --

QUESTION: This is the grand jury I asked about.

MR. ASHLEY: Well, I do not believe there is any authority under -- at that time to do it. We would of course turn over any of our business records.

QUESTION: And that would not include the pen register?

MR. ASHLEY: I think we would raise the question as to the possible distinction between pen register information and ordinary business records, in view of the previous state of the law and the question as to whether pen registers -- Title III --

QUESTION: If the pen register was transcribed on your records, you would produce it? If it was not on your records, you would not produce it?

MR. ASHLEY: I think --

QUESTION: And then I would like to hear you explain that.

MR. ASHLEY: Well, I think with the question of the coverage of Title III, whether pen register interception is included within the scope of Title III --

QUESTION: I am not talking about Title III.

MR. ASHLEY: -- we would raise the question as to whether we should respond to such --

QUESTION: If you put a pen register on a man's phone and you billed them pursuant to the pen register, you would produce the bill upon subpoena?

MR. ASHLEY: We would produce our billing records, yes.

QUESTION: Upon the subpoena. But you would not produce the pen register?

MR. ASHLEY: We would certainly raise the same kind of question we have raised here, because of the precedent that existed before the enactment of Title III in 1968, and raise the question as to whether that did not carry over now.

There was a distinction made between pen register records and toll billing records before 1968, and I think if pen registers are covered under Title III, you have the same question at least raised as to whether it would not be an indirect way of accomplishing the same result.

QUESTION: Suppose, Mr. Ashley, that there were widespread complaints in a particular area that pen registers were being abused by the telephone company for their own purposes

and perhaps for purposes unnecessary involving invasions of privacy. Could the Federal Communications Commission require you by subpoena or other process to produce all of your pen registers for the purposes of that inquiry?

MR. ASHLEY: Well, the question had not occurred to me before, Your Honor. In investigations involving whether we are lawfully carrying out our duties, I suppose under proper safeguards of confidentiality and impoundment and that sort of thing, yes, they would be, probably would.

QUESTION: Confidentiality for what purpose, to what end?

MR. ASHLEY: Well, to limit the disclosure only to the Federal Communications Commission and only within such circumstances as were necessary for it to carry out its lawful functions.

We have had situations like that with respect to national security matters, and all. I am speculating with you, but I think the question, if they had a legitimate investigation going as to whether the telephone company was conducting itself properly and carrying out its functions, under the act, then I think you would have to set about to try to have the necessary safeguards to prevent the disclosure of the information to anyone else, but probably under those circumstances, it could be done.

QUESTION: Do you see a lack of safeguards in the

41 present situation?

MR. ASHLEY: Well, I see that there has been a long history of trying to limit the circumstances under which law enforcement authorities do get this kind of information, and there have been throughout decades before, this was unavailable to them, and Congress in enacting Title III set up only certain limited crimes and required the permission to be secured from the Attorney General or his designated assistant in order to centralize the extent to which electronic surveillance was available to the law enforcement authorities, and all of that is circumvented if this can be done outside the scope of Title III.

I would just like in conclusion to call the attention again of the Court to the pictures which are at the end of our brief. Questions were asked earlier about this.

The pen register in the modern version, which is the last page, is an electronic cabinet about this wide and that high, with the -- oh, it's about maybe 18 to 24 inches long -- but the modern version has all of these access points where you can plug in whatever circuits or whatever function you want to perform.

QUESTION: Very well. Thank you, Mr. Ashley.

QUESTION: Mr. Ashley, our rules require, when the argument portion of the brief exceeds 20 pages, that there be a summary of argument inserted. I do not think that rule was

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complied with here, and I do suggest that you do it the next time. It makes it a little easier for us.

MR. ASHLEY: Thank you, Your Honor. This is a precedent for me, and I am sorry if I did not abide by the rule.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. WALLACE: I have three brief points, Mr. Chief Justice.

In the first place, even though the telephone company is here challenging the authority to issue the warrant under Rule 41, it did comply in part. It did everything that was required of it under the warrant except the leasing of the line, and it well might have felt some obligation to do so. It is not standing here in the shoes of an ordinary third party, an innocent bystander. It not only is a public utility, but there was a finding of probable cause to believe that its facilities which it is operating for a profit are being used in the conduct of an enterprise violating the criminal law in circumstances where it would be very difficult to conduct the enterprise without the use of the telephone company's facilities. And that matter should not be lost sight of when arguments are made generalizing about bystanders and whether courts can impose duties on them.

The second point is that Title III, not only does the

legislative history specifically disclaim that it is intended to limit the use of pen registers, but if Title III were to be applied in this area, it would be a very serious interference with the legitimate use of pen registers in criminal investigations.

Title III, because it deals with wire-tapping, overhearing the contents of telephone communications, is very restrictive. Not only are there cumbersome procedures to follow which are quite time-consuming, but the list of crimes for which it can be used is quite limited, whereas pen registers can be very useful in the investigation of escaped fugitive offenses, civil rights act offenses, and various others that we have mentioned in the footnote in our brief that are not covered by Title III.

Since we here complied with all the requirements that would be necessary in order to be able to get a search warrant to go into someone's premises and search through his papers, there is no reason to limit a far less intrusive investigatory technique which can be very useful in these areas of detecting criminal activity.

And finally --

QUESTION: Well, your search warrant analogy -- but you do not compel the person whose place is being searched to help you.

MR. WALLACE: Well, it is not the individual whose

telephone is being used who is compelled to help in these circumstances, it is the telephone company, whose facilities are being used.

QUESTION: Well, if you are searching a hotel room, you do not come in, you do not order the proprietor of the hotel to help search.

MR. WALLACE: There may be circumstances in which he can be asked to cooperate in executing the search if his help is needed to gain access. There is a provision in Title XVIII, Section 3105, which indicates that when needed, persons can be required to help in the execution of a search warrant, but we do not rely on that here. But it is not an unprecedented or unheard of thing.

QUESTION: The proprietor can furnish a key to get in the room --

MR. WALLACE: That is correct; that is the kind of help that I am speaking of, and we frequently do get that kind of help when someone is operating a facility for profit and that facility is being used in furtherance of criminal enterprise, or at least there is probable cause to believe that.

My final point is, what about the absence of action by Congress here, other than its indication in the legislative history of Title III that the use of pen registers is not to be restricted?

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The contention of the telephone company in effect is that in the absence of action by Congress, the telephone company rather than the court is to decide whether an order of this kind can be carried out when the telephone company's facilities are needed.

But I think that the jurisprudence of this Court is to the contrary. Of course, Congress is free to act. There is a case cited at page 18A of the appendix to the petition for certiorari by Judge Mansfield in his dissenting opinion. In the middle of the page there is a quotation from, this is page 18A, there is a quotation from this Court's opinion in *Adams v. United States ex rel. McCann*, in which a unanimous Court, speaking through Mr. Justice Frankfurter -- it was unanimous on this point -- upheld the authority of a Court of Appeals to issue a writ of habeas corpus in circumstances where the Court of Appeals concluded that there were obstacles to the taking of a pro se appeal that warranted using habeas corpus for review.

QUESTION: That was not --

MR. WALLACE: Well, they split on the merits, but they were unanimous that it was proper for the Court of Appeals in that case to use the extraordinary writ, and the point that I want to make is that the quotation that appears in the middle of the page there leaves out the first part of the sentence, but the first part of the sentence by a careful

judicial craftsman, speaking on behalf of the Court, reads:

"Unless appropriately confined by Congress, a federal court may" et cetera.

The idea is that in the absence of action by Congress there is power in the courts, and it should be exercised in order to effectuate the court's orders, and if Congress wants to specify another method of proceeding, that of course is part of the legislative authority, and that is one reason why we think it is more respectful of that authority to rely on the All Writs Act, rather than a concept of inherent power which some of the Courts of Appeal have preferred in this area.

But there is no reason to think that in the absence of action by Congress, someone other than the courts should decide whether these warrants should be effectuated.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.
Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:12 o'clock, p.m., the case in the above-entitled matter was submitted.)

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